Supreme Court, U.S.
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No. 92-1312

In The

Supreme Court of the United States

October Term, 1992

LIBERTY MUTUAL INSURANCE COMPANY

and

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS,

Petitioners,

v.

ELJER MANUFACTURING, INC. f/k/a HOUSEHOLD MANUFACTURING, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioners, Liberty Mutual Insurance Company and The Travelers Indemnity Company of Illinois, file this reply to the response of Eljer Manufacturing Co., Inc. ("Eljer") to their petition for a writ of certiorari in this case.

ARGUMENT

Eljer's response misrepresents the proceedings below.

It is not true that "[i]t was only when the panel declined to accept their construction that petitioners decided that the drafting history of the CGL policy presented factual issues that should not have been considered at all." (Resp. Br. 6) To the contrary, petitioners argued in the Court of Appeals that drafting history should *not* be considered on appeal because it was not at issue in the District Court:

> This "drafting history" argument, however, was *not* asserted by Eljer below. Nor were any of the various sources for that alleged drafting history cited below. Accordingly, Eljer's "drafting history" argument has been waived.

(Travelers Opening Brief on Appeal 30; emphasis in original) That is precisely the point raised in the petition to this Court – that the Court of Appeals should not have considered and found facts regarding drafting history because they were never presented to or considered by the District Court.

Moreover, petitioners were in no position to complain of improper appellate factfinding before the Seventh Circuit issued its decision. The District Judge had decided in petitioners' favor without reference to the factual issues injected by the Seventh Circuit. Thus, there is no logic at all to Eljer's snide rhetoric that the petitioners' concern about factfinding is "newly minted" and "occurred to them" only after the Seventh Circuit issued its decision. (Resp. Br. 7) After the Seventh Circuit engaged in improper appellate factfinding, the petitioners objected at their first available opportunity – in their petition for rehearing.

Nor is it true that the Seventh Circuit "reviewed published materials regarding the drafting history of the CGL form policy, not to resolve a factual issue concerning the parties' subjective 'intent,' but to understand the meaning and evolution of the policy language at issue and, in particular, the reason for the 1973 change." (Resp. Br. 5) Judge Posner's opinion states unequivocally that he was determining the "intent" of the drafters of the 1973 CGL policy:

> There was no *intent* to curtail liability in a case of physical touching, as where a defective water system is installed in a house.
>
> * * *
>
> [W]hat the draftsmen of the Comprehensive General Liability Insurance policy apparently *intended* [the term "physical injury" to mean] . . . is a loss that results from physical contact . . . .

(A10-11; emphasis supplied) Petitioners doubt that a writer as skilled as Judge Posner said "intent" and

"intended" when he really meant something else. The linchpin of the decision was – by Judge Posner's own words – his finding concerning "intent."

Nor is it true that petitioners relied on decisions "using substantially the same analysis" as Judge Posner. (Resp. Br. 5 n.1) Judge Posner himself said of those decisions that they reached their conclusions "without examining the considerations – the drafting history of the provision and the purposes of insurance – that argue against such a reading." (A19)

Finally, Eljer argues, predictably, that the petition is "nothing more than an attempt to contrive a federal procedural question after petitioners lost on the state-law issue . . . ." (Resp. Br. 4) To the contrary, the federal procedural question presented here – whether a Court of Appeals can decide facts neither presented to nor weighed by the court below – goes to the heart of the concept of due process upon which the prohibition of appellate factfinding is founded.

Moreover, the fact that the rule for decision in this case is supplied by state law does *not* undercut the importance of the federal procedural issues presented here. The Court's repeated attention in recent years to standards and burdens for summary judgment motions under Rule 56[1] underscores the significance of summary judgment issues in contemporary federal civil practice. The procedural issues – and the potential for unfairness – are the

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[1] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

same for a breach of contract claim as they are for violations of the federal antitrust or securities laws.

CONCLUSION

Forty-four years ago – in a diversity case – the Court addressed the problems resulting from appellate entry of summary judgment based on improper appellate factfinding. *Fountain v. Filson,* 336 U.S. 681 (1949). The decision below contravenes the Court's holding in *Fountain v. Filson,* as well as in numerous decisions striking down appellate factfinding outside the summary judgment context. It is as appropriate now as it was in *Fountain v. Filson* for the Court to grant the petition to address the limitations on the powers of the Courts of Appeals to order entry of summary judgment against a party who has not

had an opportunity to contest the facts upon which the judgment is founded.

Respectfully submitted,

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